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**NO. 253**

(OCTOBER TERM, 1906)

IN THE

# Supreme Court of the United States

R. G. STONE, R. M. FINLEY AND NANNIE E. FINLEY,
Plaintiffs in Error.

vs.

SOUTHERN ILLINOIS AND MISSOURI BRIDGE COMPANY,
Defendant in Error,

In Error to the Supreme Court of the State of Missouri.

## REPLY BRIEF FOR PLAINTIFFS IN ERROR

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## REPLY BRIEF FOR PLAINTIFFS IN ERROR

It seems appropriate to submit a few words of reply to the learned Brief for Defendant in Error, in view of contentions therein which appear to call for some comment.

I

**It is claimed that Plaintiffs in Error waived the right to apply for a writ of error. We reply that there was no such waiver.**

In the Missouri Circuit Court, before the trial, defendants (now plaintiffs in error) filed an answer (Printed Record, p. 18–20) in which they assert, in a most positive manner, that the right to condemn the property described in the petition did not extend

> "**beyond the seven hundred and twenty (720) feet,** the length of the approach to said bridge on the Missouri side of said Mississippi River, for the reason that by the terms of said Act of Congress, approved as aforesaid, on January 26, 1901, the approaches to said bridge as to length, height, breadth and general character were placed **under the supervision of, and to be determined by the Secretary of War,** or the Civil Engineers of his department, and that by said Act of Congress, that power was vested **alone** in him".

The defendants' answer contained other distinct averments, invoking immunity under the Act of Congress (authorizing the construction of the bridge) claiming that thereby the limits of the right to condemn the land of defendants for the bridge approach were defined absolutely.

(See excerpts from Amended Answer in our first Brief in this Court, pp. 7–9.)

Before the trial, now the subject of review by this writ of error, defendants (plaintiffs in error) objected in the clearest terms by their answer to any condemnation of their property, **beyond the limits declared by the Act of Congress** and marked on the river bank **by the map and design** approved by the Chief of Engineers and by the Secretary of War.

To the contention made by defendant in error throughout its learned Brief, to the effect that there is no Federal question involved in the case as presented to this Court, we answer that the vital Federal question was distinctly made by the **defendant in error itself** at the very **outset** of the proceedings by the PETITION which it filed (Printed Record, pp. 5–6). In that petition it is said:

> "That said bridge is being constructed **under an Act of Congress** entitled, an Act to authorize the construction of a bridge across the Mississippi River at or near Grays Point, Missouri, approved January 26th, 1901. That the same is being constructed **within the territorial limits and conditions in said Act fully set out.**"

It has been the contention of the plaintiffs in error that **"the territorial limits and conditions in said Act fully set out"** (to quote the very words of the petition of the Bridge Company) **excluded** the land of defendants (now plaintiffs in error) which the Bridge Company by its petition sought to condemn.

It has been steadily the contention of the plaintiffs in error that the right to condemn their land was restricted and limited by the Act of Congress, and that a proper construction of that Act (the only authority for the erection of the bridge and its approaches) forbade the taking of any land for the bridge purposes, **beyond the limit of seven hundred and twenty feet from the river bank,** that limit having been PRESCRIBED **by the map submitted by the Bridge Company itself** to the Federal authorities, and approved finally by the Secretary of War as defining the "bridge, approaches and accessory works" authorized by Congress in the exercise of its supreme power over the navigable waters of the United States.

The construction of that Act of Congress (in the circumstances described) was invoked by plaintiffs in error from a point in the litigation **anterior to the trial of the case**, as appears by the record. And at every stage in the proceedings since then, that contention has been renewed.

It was said more than fifty years ago in this Court that,

> "As the Court of Appeals could not have adjudicated the case without having denied to the defendant a defense which he claimed under a law of the United States, the case is properly here under the 25th section of the Judiciary Act of 1789."
> Teal v. Felton, 12 How. 289

The plaintiffs in error called earnestly for a construction of the Acts of Congress we have cited in this case from the beginning, and they appealed to that construction to protect them from the taking of their land, against their will, under the pretended authority of the Federal law. But their cry and their appeal have been in vain. The idea that, at any stage, they **waived** their claim of immunity under the Federal law is a figment of fancy for which the record in the case furnishes no foundation whatever.

II

**It is claimed by defendant in error that plaintiffs in error acquiesced in the judgment below.**

**We reply that there has been no acquiescence.**

It is intimated, in the learned Brief for Defendant in Error (p. 22) that **"doubtless, the money was paid"**, meaning the amount of damages awarded as compensation for the taking of the land!

The hint is that by accepting such payment plaintiffs in error **waived the right to review** the judgment.

It is a matter of regret to us to be obliged to say that **this intimation is** WITHOUT THE SLIGHTEST FOUNDATION.

**There is nothing in this record to warrant such a statement.** On the contrary, the record discloses that the Cape Girardeau & Thebes Terminal Railroad Company attempted to be made a party defendant in the case, and that its application to that end was denied.

No complaint is made in this Court on that score, by plaintiffs in error, but their 17th assignment of error, in the Motion for New Trial (Printed Record, p. 180) complains of the action of the trial court **"in refusing to make"** the Terminal Railroad **"a party defendant,** as prayed in their Amended Answer", etc.

The Supreme Court of Missouri in its last opinion rules that "no error was committed in refusing it" (the Terminal Railroad) "to become a party defendant" (194 Mo. 186).

There is not a scintilla of showing in this record under review that the Terminal Railroad, or any one else, has **accepted** any payment of damages.

The judgment reviewed is in favor of the defendants (now plaintiffs in error) for the amount of the damages awarded, which are ordered to be **"paid into Court"** (Printed Record, p. 21).

There is **nothing before this Court even to suggest that any one has ever accepted or been paid said fund.**

Hence the contention made by defendant in error, on the groundless "assumption" that plaintiffs in error **waived their right of review** and accepted the damages awarded, is futile **and utterly without merit.**

The whole second point in the learned brief of defendant in error (pp. 13, 22–24) is planted on that erroneous assumption. The contention is not worthy of further notice.

III

**The defendant in error contends that** "the record does not show that the judgment of the State Court was based on a Federal question".

**We reply that not only does that judgment necessarily involve the decision of Federal questions, but those presented here were properly raised in many ways in the Court of first instance, before the trial, as well as at every later stage of the proceedings.**

The largest Federal question in the case is that, because of the Acts of Congress, expressed in the **"designs and drawings of the bridge, piers, approaches and accessory works"**, approved by the Secretary of War, the condemnation of the land in question should have been restricted to the area of the bridge approach as indicated by those **"designs and drawings"**, namely, to the limit of 720 feet from the river bank on the Missouri side.

The area of condemnation was enlarged by the State Courts to an extent of **more than two miles** (Printed Record, pp. 32, 35) yet there is no authority of any sort for that extension of the area, since the petition of the Bridge Company invokes the power of eminent domain only **"under an Act of Congress"**, approved January 26, 1901, and **"within the** TERRITORIAL LIMITS **and conditions in said act fully set out"** (petition of Plaintiff, Printed Record, p. 5).

The Federal questions argued at this bar were raised below in several forms:

BEFORE THE TRIAL

1. *By exceptions to the Commissioners' report*, which report described land of defendants, proposed to be taken, **beyond the limits of 720 feet** from the river bank. The exceptions object to that taking as being "VOID", because the Act of Congress of January 26, 1901, and the plans approved by the Secretary of War fixed **"the length of the approach** to said bridge on the Missouri side at 720 feet". (*See 1st exception*, Printed Record, p. 13; and 2nd, 3rd, 6th, 7th, 8th and 10th exceptions, pp. 13–15.)

2. *By the Answer of defendants*, of which answer portions are copied in our first Brief (pp. 7–9) which clearly assert a claim to the protection of the Federal organic and statutory law (Printed Record, pp. 18–20).

AT THE TRIAL

3. *By objections to evidence*, in which objections plaintiffs in error claimed that the petition, "taken in connection with the charter **and the Act of Congress**", disclosed **"that the Court has no power** to deal with the land, subject-matter of the petition, **lying west of the approach proper, as fixed by the Secretary of War,** which is 720 feet".

4. *By requests for instructions* (refused) expressly asking the Court to limit the power to appropriate the land to "a distance of 720 feet for the western approach to its bridge", this being "the length of the approach as fixed by the Secretary of War, it being his duty **by the terms of said Act of Congress** to ascertain and fix the **length of said approach** (see Instruction in full in our first Brief, p. 23, and in Printed Record, p. 174).

AFTER THE TRIAL

5. *By motion for new trial* (Printed Record, pp. 178–180) wherein the 9th, 10th, 11th, 15th and other assignments raised Federal questions now presented for review.

6. *By motion in arrest*, in which the 3d and 4th grounds claim that the order of the Court is void, "except as to 720 feet" of defendant's property, "the length of the approach to said bridge fixed by the Secretary of War" (Printed Record, p. 181).

7. *By assignments of error and briefs*, in the Supreme Court of Missouri before the hearing in that court (Printed Record, pp. 183–185).

8. *By motion for rehearing* (Printed Record, p. 194).

9. *By assignments of error, accompanying petition for writ of error*, from this Court (Printed Record, p. 198).

In all of these many objections to the taking of the land against the will of plaintiffs in error, they protest against the attempt of the Bridge Company to pass beyond the area of the **"bridge, approaches and accessory works"**, whose limits are inflexibly and unalterably defined by the Federal authority and the maps and drawings which it required to point out **specifically** that area.

The precepts governing the development of Federal questions in the State Courts for review by this Court are so familiar to your Honors that it does not seem needful, at this time, to indulge in any elaborate argu-

ment to maintain our contention that this case has been properly brought within the revisory jurisdiction of this Court. We merely cite a few typical cases which we consider sustain our contention on that point, in addition to those mentioned in our first brief (p. 72).

Davis v. Packard, 6 Pet. 41
C. B. & Q. Ry. v. Chicago, 166 U. S. 226
Sully v. Bank, 178 U. S. 289
Kaukauna Water Co. v. Green Bay Canal, 142 U. S. 254
M. K. & T. Ry. Co. v. Elliott, 184 U. S. 530
C. B. & Q. Ry. Co. v. People, 200 U. S. 561
Kaukauna Water Co. v. Paper Co., 172 U. S. 58
Terre Haute & Ind. R. R. Co. v. Indiana, 194 U. S. 579

IV

**The Federal law, limiting the area of the bridge approach, is supreme; and the Missouri law can not** lawfully "deviate from such plans" **as are approved by the Federal authority** (defining the limits of the "bridge, approaches and accessory works") **without sanction of the Federal authority.**

This we claim to be the effect of the general Act of Congress regulating the construction of bridges over navigable waters, as well as of the special Act relating to this bridge.

The former Act declares that **"it shall not be lawful"** to construct any "BRIDGE" over any navigable river without the consent of Congress, and until approval of the plans by the Chief of Engineers and the Secretary of War; and this is required, even as to **"waterways the navigable portions of which lie wholly within the limits of a single State".**

That Act also contains the following imperative and *supreme commands* as to the effect of the plans thus approved:

> "*And provided further*, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, **it shall not be lawful to deviate from such plans either before or after completion of the structure** unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War." (30 Stat. L., 1151.)

In the special Act of Congress relating to this particular bridge (approved January 26, 1901) the reason why such positive Federal legislation exists is clearly outlined. It is to set and define the clear boundaries of **Federal supervision and regulation** of the **"tolls"** for the passage of passengers, trains, etc., over the structure as authorized by the Federal law and by the plans approved under the Federal law, for the Act declares that those tolls shall be such **"as may be approved from time to time by the Secretary of War"** (Printed Record, p. 85).

31 U. S. Stat. L. 741, sec. 1.

By the second section of this Act it is declared:

> Sec. 2. That the bridge BUILT, operated and maintained **under this Act**, and SUBJECT TO ITS LIMITATIONS, shall be a **lawful structure**, and shall be recognized and known as a post route, upon which also **no higher charge shall be made for the transmission over the same**, of the mails, the troops, and the munitions of war of the United States than the rate per mile paid for the

transportation of the same over the railroads or public highways leading to said bridge, and it shall enjoy the rights and privileges of other post roads in the United States; and **equal privileges** in the use of said bridge shall be granted to all telegraph and telephone companies; **and the United States shall have the right of way across said bridge and its approaches** for postal-telegraph or for telephone purposes.

These provisions are designed to secure to the Federal Government the rights mentioned, **on and over** the "bridge, **approaches and accessory works**", authorized by the Act (see section 7) and defined by the "*design and drawings*" thereof, which are to be approved by the chief of the U. S. Engineers and by the Secretary of War.

The Federal jurisdiction created to regulate **tolls** and **to protect the government in its use of the bridge and approaches** as they are defined by the drawings and plans approved by the Secretary of War do not expand by the efforts of a local State authority.

The reason why both and all the Federal statutes **forbid,** or declare **unlawful,** such bridges and approaches as do not conform to plans approved, as required, is to define, beyond possibility of mistake, the **limits of territory** within which the Federal power granted to regulate tolls shall be effective.

Section 9 of the Act casts a flood of light upon the intention of this legislation, in the particular to which we refer:

> Sec. 9. That all railroad companies desiring the use of any bridge constructed under this Act **shall have, and be entitled to, equal rights and privileges relative to the passage of railroad trains or**

> **cars over the same and over the approaches there,** upon payment of **a reasonable compensation** for such use; and in case the parties interested shall fail to agree upon the sum or sums to be paid and upon the rules and conditions to which each shall conform in using said bridge, all matters at issue between them shall, upon the application of either party, be determined by the Circuit Court of the United States in and for any district **in which any portion of said bridge may be.**

Under this law, the power to determine, in case of dispute, the **"reasonable compensation"** for the use of the structure by "all railroads" is vested in the **Federal Courts.** But this power is limited to the **"bridge, approaches and accessory works"** (sec. 7) as defined by the required plans and drawings, approved by the Secretary of War.

Who shall exercise that power as to that part of the bridge and approaches in this case, **outside the scope of the plan and approved drawings?**

Under the law, what could the Federal Courts do in regard to fixing the compensation for passage over that part of the approach beyond the limits defined therefor by the plans and drawings which received the official approval?

Learned counsel for defendant in error appear to have lost the meaning we intended to convey by our first brief. **Our claim is that the condemnation should have been confined to the territorial limits** marked by the Acts of Congress **authorizing and** DEFINING the **"bridge, approaches and accessory works",** and that while the local law might be utilized, if it had the power, to condemn the land, such condemnation was necessarily restricted to the area which the Federal authority saw fit to approve as the "bridge, approaches

and accessory works". Our claim is that the local law must yield to the Federal law as to the definition ON THE GROUND of what constitutes the bridge and its approaches.

A study of these congressional Acts will unfold the evident purpose of Congress to require the approved plans to be respected and obeyed, as the sole authority to define the actual limits of the "bridge, approaches and accessory works" (sec. 7).

Having, by submitting the plans and drawings as required by section 7, defined the area of the proposed and authorized structure, and also defined thereby **the extent to which the Bridge Company submits itself and its business of interstate commerce** across the bridge, to Federal SUPERVISION as to "tolls" and "reasonable compensation" for transportation, the Bridge Company should be required to keep within the area marked by the Federal law of its being. There is no injustice in this, nor in holding that the Bridge Company is **restrained,** by the same Federal law of its being, from extending its bridge approaches far beyond its own plans and drawings thereof.

Our main claim is that any legislation of Missouri, which may be supposed to permit such performance by the defendant in error, is VOID and of no force **because in conflict with the paramount Federal law** on this subject.

If the Bridge Company wished to enlarge the scope of its proposed structure, it should first have submitted its modified plans to the same authority which approved the originals; but it could not, lawfully, take into its own hands the decision of the propriety of such proposed action. The Federal authority must first sanction any such change of plans.

> "**It shall not be lawful to deviate** from such plans either BEFORE OR AFTER COMPLETION **of the structure,** unless the modification of such plans has **previously** been submitted to and received the approval of the Chief of Engineers and of the Secretary of War."
> (30 Stat. L., p. 1151, sec. 9)

This Act of Congress we claim is the Supreme Law of the Land. No Missouri law can narrow its meaning or dispense with the limitations it imposes.

The approved plans and drawings in the case at bar fix the bridge approach at 720 feet from the river bank, and those plans likewise give to all citizens in the position of the plaintiffs in error immunity against the taking of land beyond those limits, on the facts which here appear.

The preservation of free navigation of the stream, as defendant in error contends, may be *one* of the objects of the Federal legislation on this subject, but it is not the only object. The other purposes of regulation and supervision of the USE of the structure, **as authorized by the Federal law alone,** are quite as important and vital in these latter days. The integrity and force of the Federal legislation on these subjects can not be maintained and preserved except by a firm and steady assertion by this High Court of the principles which we have endeavored to expound in these pages.

We respectfully submit that the judgment below should be reversed, with such directions as may be appropriate in the circumstances.

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St. Louis, Mo., March, 1907.